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No. 88-228

In The
Supreme Court of the United States
October Term, 1988

JEFFREY ST. HILAIRE,
Appellant,

v.

STATE OF MAINE,
Appellee.

On Appeal from the Maine Supreme Judicial Court

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the constitutional claims advanced by Appellant were properly presented below.

2. Whether the State may constitutionally require that a driver whose license has been revoked as an habitual offender raise any challenges to that designation *before* getting behind the wheel in violation of the State's revocation order.

3. Whether Appellant has standing to argue that due process required that he receive actual notice of his designation as an habitual offender.

4. Whether the State may use means reasonably calculated to notify habitual offenders that their license has been revoked or whether the State must prove that such offenders received actual notice.

5. Whether an uncounseled prior misdemeanor conviction that did not result in incarceration may be used as a basis for the State's revocation of a motor vehicle operator's license.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATE STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
A. St. Hilaire's Status as of January 1, 1987	5
B. Proceedings Below	7
ARGUMENT	12
I. THE CONSTITUTIONAL CLAIMS ASSERTED BY APPELLANT WERE NOT PROPERLY PRESENTED BELOW.	12
II. APPELLANT'S DUE PROCESS ATTACK ON THE APPLICATION OF 29 M.R.S.A. § 2298 MAY BE SUMMARILY REJECTED.	15
III. APPELLANT DOES NOT HAVE STANDING TO COMPLAIN ABOUT THE FAILURE TO PROVE ACTUAL NOTICE; AND, IN ANY EVENT, HIS CLAIMS ARE WITHOUT MERIT.	17
IV. APPELLANT'S CLAIM THAT 29 M.R.S.A. § 2298 INFRINGES UPON HIS SIXTH AMENDMENT RIGHT TO COUNSEL IS FORECLOSED BY THIS COURT'S DECISION IN *LEWIS v. UNITED STATES.*	19
V. APPELLANT'S CONFRONTATION CLAUSE AND CONCLUSIVE PRESUMPTION CLAIMS ARE WITHOUT MERIT.	20
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Baldasar v. Illinois, 446 U.S. 222 (1980) 19

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 18

Cardinale v. Louisiana, 394 U.S. 437 (1969) 15

Gideon v. Wainwright, 372 U.S. 335 (1963) 16, 20

Harrington v. Inhabitants of the Town of Garland, 381 A.2d 639 (Me. 1978) 14

Herb v. Pitcairn, 324 U.S. 117 (1945) 13

Lewis v. United States, 445 U.S. 55 (1980) 16, 19, 20

McGowan v. Maryland, 366 U.S. 420 (1961) 18

Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) 18

Patterson v. New York, 432 U.S. 197 (1977) 15

Scott v. Illinois, 440 U.S. 367 (1979) 20

State v. Higgins, 338 A.2d 159 (Me. 1975) 16

State v. O'Neill, 473 A.2d 415 (Me. 1984) 16

State v. Vosmus, 431 A.2d 621 (Me. 1981) 15

United States v. United Mine Workers, 330 U.S. 258 (1947) 16

Walker v. City of Birmingham, 388 U.S. 307 (1967) 16

Warth v. Seldin, 422 U.S. 490 (1975) 18

STATUTORY PROVISIONS

17-A M.R.S.A. § 1252(2)(C) 5

17-A M.R.S.A. § 1301(1)(A-1) (1983) 5

29 M.R.S.A. § 58 (Supp. 1987) 5, 11, 13, 20, 21

TABLE OF AUTHORITIES—Continued

Page

29 M.R.S.A. §§ 2242, 2297 (Supp. 1987) 4

29 M.R.S.A. § 2294(1) (Supp. 1987) 4

29 M.R.S.A. § 2294(2) (Supp. 1987) 4

29 M.R.S.A. §§ 2291-99 (Supp. 1987) ..... *passim*

TEXTS

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 3.22 at 158 (6th ed. 1986) 13

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice,* § 3.19 at 144 (6th ed. 1985) 15

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JEFFREY ST. HILAIRE,

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v.

STATE OF MAINE,

Appellee.

On Appeal from the Maine Supreme Judicial Court

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Appellee State of Maine moves to dismiss this appeal or, in the alternative, to affirm the judgment of the Maine Supreme Judicial Court on the grounds that the issues raised by appellant were not properly presented below and that, in the alternative, the issues raised by appellant do not present substantial federal questions and do not warrant plenary review.

STATE STATUTES INVOLVED

This appeal primarily concerns certain provisions in the Maine Motor Vehicle Laws that are applicable to habitual offenders. 29 M.R.S.A. §§ 2291-99 (Supp. 1987). At the time relevant to this case, "Habitual offender" was defined in 29 M.R.S.A. § 2292 in pertinent part as follows:

> An habitual offender is any person, resident or nonresident, whose record, as maintained in the office of the Secretary of State shows that the person has accumulated convictions or adjudications for separate and distinct offenses described in subsection 1, 2 or 3, committed within a 5-year period, provided that, where more than one included offense is committed on the same day, multiple offenses shall be treated for purposes of this chapter as one offense:
>
> 1. *Three or more convictions.* Three or more convictions or adjudications, singularly or in combination, of any of the following separate and distinct offenses arising out of separate acts:
>
> A. Homicide resulting from operation of a motor vehicle;
>
> B. Operating or attempting to operate while under the influence of intoxicating liquor or drugs or with a blood alcohol level of 0.10% or more;
>
> C. Operating or attempting to operate a motor vehicle in a reckless manner or in such a manner as to endanger any person or property;
>
> D. Operating a motor vehicle when the operator's license, permit or privilege to operate a motor vehicle has been suspended or revoked;
>
> E. Operating a motor vehicle without a license to do so;

F. Knowingly making any false affidavit or swearing or affirming falsely to any manner or thing required by the motor vehicle laws or as to information required in the administration of these laws;

G. Commission of any offense punishable by a maximum term of imprisonment equal to or exceeding one year under the motor vehicle laws of Maine or any offense punishable by a maximum term of imprisonment equal to or exceeding one year in the commission of which a motor vehicle is used;

H. Failure of the driver of a motor vehicle involved in an accident resulting in the death or injury of any person to stop close to the scene of the accident and report his identity;

I. Failure of the driver of a motor vehicle involved in an accident resulting only in damage to an attended or unattended vehicle or other property to stop close to the scene of the accident and report his identity or otherwise report the accident;

J. Eluding an officer, as defined by section 2501-A, subsection 3; or

K. Passing a roadblock, as defined by section 2501-A, subsection 4.

2. Repealed. 1981, c. 679, § 50, eff. April 15, 1982.

3. Inclusions. The offenses included in subsection 1 shall be deemed to include offenses under any federal law, and law of another state or any valid town, city or county ordinance substantially conforming to the aforesaid state statutory provision.

Section 2293 provides that "[t]he Secretary of State shall revoke, without preliminary hearing, the license, permit, or privilege to operate a motor vehicle of any per-

son defined as an habitual offender as set forth in section 2292."

Section 2294 provides that any person whose license to operate has been revoked pursuant to section 2293 may request a hearing before the Secretary of State within 30 days. 29 M.R.S.A. § 2294(1) (Supp. 1987). The issues at such a hearing are whether the person whose license has been revoked is the same person named in the Secretary of State's transcript and whether that person's record brings him within the definition of an habitual offender. 29 M.R.S.A. § 2294(2) (Supp. 1987). A driver may thereafter seek judicial review by bringing a petition for review in the Maine Superior Court. 29 M.R.S.A. §§ 2242, 2297 (Supp. 1987).

A revocation under section 2293 is indefinite in duration, 29 M.R.S.A. § 2295 (Supp. 1987), but a driver may ordinarily petition for relief from designation as an habitual offender after one year. 29 M.R.S.A. § 2296 (Supp. 1987). However, the statute provides a specific penalty for anyone who is caught driving while his license has been revoked due to his designation as an habitual offender. Thus, 29 M.R.S.A. § 2298 (Supp. 1987) provides in pertinent part as follows:

> It shall be unlawful for any person to operate any motor vehicle on a public way, as defined in Title 17-A, section 505, subsection 2, in this State while the revocation prohibiting its operation remains in effect. Any person found to be an habitual offender under this chapter, or former chapter 18, who is thereafter convicted of operating a motor vehicle in this State while the revocation prohibiting operation is in effect shall have committed a Class C crime.

Under Maine law a Class C crime is punishable by a sentence of imprisonment not to exceed 5 years and is usually subject to a potential fine of up to $2,500. *See* 17-A M.R.S.A. §§ 1252(2)(C); 1301(1)(A-1) (1983). 29 M.R.S.A. § 2298, however, itself specifies a fine of up to $5,000. Moreover, a driver convicted of operating a motor vehicle while his license has been revoked as an habitual offender may not be granted relief from the revocation of his license for three additional years. *Id.*

The other statutory provision called into question by appellant is 29 M.R.S.A. § 58 (Supp. 1987), which provides:

> Notwithstanding any other provision of law or rule of evidence, the certificate of the Secretary of State or his deputy, under seal of the State, shall be received in any court in this State as prima facie evidence of any fact stated in the certificate or documents attached thereto.

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STATEMENT OF THE CASE

A. St. Hilaire's Status as of January 1, 1987.

On or about July 8, 1986 the Maine Secretary of State's office determined that appellant Jeffrey St. Hilaire was an habitual offender as defined in 29 M.R.S.A. § 2292 (1). Written notification of this determination[1] was

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[1]The Secretary's written notification of revocation due to St. Hilaire's designation as a habitual offender is reproduced in the Appendix to this Motion ("State's App.") at App. 3-4. This

(Continued on following page)

mailed to St. Hilaire no later than July 11, 1986, informing him in pertinent part as follows:

> This is to notify you that your driving record . . . has brought you within the statutory definition of an habitual offender, found in 29 M.R.S.A. Ch. 18-A. As a result of this, the Secretary of State is hereby notifying you that your motor vehicle operator's license and/or right to operate in the State of Maine is revoked for an indefinite period effective 7/21/86.

The Secretary's notice advised St. Hilaire that he had the opportunity to request a hearing within 30 days. It also stated that if St. Hilaire was convicted of operating a motor vehicle while this revocation was in effect, he would be "subject to penalties of up to $5,000 and/or 5 years imprisonment and an additional revocation period of up to 3 years." State's App. at App. 4.

The Secretary of State's finding that St. Hilaire was an habitual offender was based on three convictions that had occurred within the past five years. The first was his conviction on November 13, 1981 for operating without a license. The second was his conviction on February 29, 1984 for operating a motor vehicle with a blood alcohol content of at least .10 percent. The third was his conviction on April 16, 1986 for operating after suspension (OAS).[2]

(Continued from previous page)

document was not put in evidence at St. Hilaire's trial but was included among certain documents marked as Defendant's Ex. 2 and submitted to the trial court as part of an offer of proof made by counsel for defendant after the close of the evidence. See Trial Transcript of November 17, 1987 (hereafter "Tr.") at 59.

[2]Because this last conviction is the focus of most of St. Hilaire's arguments on appeal, it will be discussed further below.

The revocation of St. Hilaire's license became effective on July 21, 1986, and St. Hilaire did not request a hearing on the habitual offender designation within 30 days.

Less than six months later, on January 1, 1987, St. Hilaire was stopped for speeding on Route 5 in Fryeburg, Maine. He was unable to produce a driver's license. The arresting officer then reported St. Hilaire's name and date of birth to his dispatcher and learned that St. Hilaire's license had been revoked because he had been found an habitual offender. On February 13, 1987 St. Hilaire was indicted in the Maine Superior Court, Oxford County, for operating a motor vehicle after having been declared an habitual offender in violation of 29 M.R.S.A. § 2298.

B. Proceedings Below

In the trial court, St. Hilaire did not contest that he had been operating a motor vehicle on a public way on January 1, 1987. Moreover, although he argued that he had not understood that he had been declared to be an habitual offender, he did not contest that as of January 1, 1987, he at least understood that his license had been indefinitely suspended and that therefore he was not legally permitted to operate a vehicle on that date.[3]

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[3]See Tr. 5, 64 (State's App. at App. 9, 16-17). Because all the relevant portions of the November 17, 1987 transcript are not included in the Appendix to Appellant's Jurisdictional Statement (hereafter "J.S. App."), the State has included certain additional excerpts from the transcript in the Appendix to this Motion to Dismiss or Affirm. The Court may wish to examine the entire transcript and if there is any doubt as to what transpired below, we would invite it to do so.

St. Hilaire's primary defense consisted of a series of challenges to the validity of his April 16, 1986 conviction for operating after suspension—the last of the three convictions on which his habitual offender status was based. In March of 1987 he belatedly sought an administrative hearing to contest the Secretary of State's July 8, 1986 determination that he was an habitual offender. This was denied as untimely since his request was well beyond the 30 days time limit set forth in 29 M.R.S.A. § 2294(1). He then sought relief from the Maine District Court for the Division of Southern Androscoggin where his April 16, 1986 conviction for operating after suspension had been entered.[4] Although he had originally pled guilty to that infraction, he succeeded on May 29, 1987 in having the Maine District Court vacate his conviction and the guilty plea on which it was based.[5] St. Hilaire then moved to dismiss the indictment in the instant case on the ground that he was no longer an habitual offender as a matter of law. In response, the State argued that under Maine law St. Hilaire was not entitled to wait until after he had been caught behind the wheel to challenge one of the convictions upon which the revocation of his license had been

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[4]The Maine District Court is a trial court with jurisdiction over civil violations and Class D and Class E offenses that are heard without a jury. If a jury trial is requested or more serious offenses are involved, jurisdiction lies in the Maine Superior Court.

[5]The Maine Supreme Judicial Court later noted that since St. Hilaire had long since paid the fine imposed by the court, he was not entitled to have the conviction and the underlying plea vacated. *See* J.S. App. at 3a n.4. However, it observed that the District Attorney's office apparently had not opposed the motion and had subsequently dismissed the OAS complaint. *Id.*

based. The Superior Court denied St. Hilaire's motion to dismiss the indictment.

The trial was held on November 17, 1987. Aware that St. Hilaire intended to persist in his challenge to the habitual offender designation based on the alleged invalidity of his April 16, 1986 conviction, the State filed a motion in limine on the morning of trial. In its motion, the State sought to exclude evidence as to the alleged invalidity of the April 16, 1986 OAS conviction on the ground that St. Hilaire was not entitled to bring a collateral attack on the Secretary of State's finding that he was an habitual offender.[6]

After argument, the State's motion in limine was granted by the Superior Court. Counsel for St. Hilaire then made an offer of proof in which she summarized the evidence she would have proposed to offer in the absence of the Court's ruling. Most of this evidence related to the status of St. Hilaire's license on March 25, 1986, when he was arrested on the OAS charge. Specifically, counsel stated that she would submit records from the Department of Motor Vehicles showing (1) that St. Hilaire's reinstatement fee had been credited as of March 20, 1986; (2) that he was still under suspension at 6:05 a.m. on March 25 (when he was arrested); but (3) that the suspension had been lifted at 7:48 a.m. on March 25. The evidence she sought to elicit from the Deputy Secretary of State, George Storer, and his Chief Hearing Officer, Robert O'Connell, all related to this issue and to the subsequent

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[6]The motion in limine is reproduced in the State's App. at App. 1-2.

rejection of St. Hilaire's untimely request for an administrative hearing on the July 8, 1986 habitual offender finding. *See* Tr. 23-25, 27-30 (State's App. at App. 9-11, 11-13).

During her offer of proof, counsel for St. Hilaire also listed the following testimony that she would have elicited from her client: (1) that St. Hilaire had paid his reinstatement fee in person five days prior to his OAS arrest on March 25, 1986 and had been told at that time that the payment would be credited in two days; (2) that St. Hilaire had not been represented by a lawyer when he appeared at the District Court on April 16, 1986 to answer the OAS summons issued on March 25, 1986; (3) that St. Hilaire had thought he had entered a plea of not guilty to the OAS charge; and (4) that he learned he had been put down as having pled guilty when he was told to pay the fine and was too embarrassed to go back to the judge to straighten the matter out. Tr. 29, 30 (State's App. at App. 12-13).

During the argument on the motion in limine, the trial judge raised the issue of whether St. Hilaire knew on January 1, 1987 that the Secretary of State had revoked his license as an habitual offender. On this issue counsel for St. Hilaire originally had stated that she was contesting notice "to some extent at any rate." Tr. 4 (State's App. at App. 8). Pressed on this issue she stated:

> I think I'm going to offer that the evidence will show he understood he was under an indefinite suspension but did not understand he was an habitual offender.

Tr. 5 (State's App. at App. 9).

In light of this statement, the trial court's ruling on the motion in limine recognized the possibility that the

issue of notice might be an issue at trial. Tr. 18 (J.S.App. 15a). At trial, however, St. Hilaire did not offer any evidence on the issue of notice. The State offered a certificate from the Secretary of State pursuant to 29 M.R.S.A. § 58, reciting that St. Hilaire's license had been revoked on July 21, 1986 for an indefinite period as a result of the determination that St. Hilaire was an habitual offender, that notice of the revocation was mailed to St. Hilaire at his last known address no later than July 11, 1986, and that St. Hilaire's right to operate was still under revocation on January 1, 1987.[7]

At the close of the evidence St. Hilaire's counsel moved for a directed verdict on the ground, *inter alia,* that the State had failed to prove notice was received by the defendant. Tr. 42 (State's App. at App. 13-14). In response, the prosecutor pointed out that the Secretary of State's certificate recited that notice had been mailed to St. Hilaire's last known address. St. Hilaire's motion was denied. Tr. 42-43 (State's App. at App. 13-14).

The only other reference to the issue of notice was made by counsel for St. Hilaire during argument on sentencing immediately following the jury's verdict of guilty:

> Now, Jeffrey has some limited understanding of what he received in the mail in July of 1986. He understood he was placed on indefinite suspension; but as he told me, I never saw anything in there that said I was an habitual offender. I thought I was under indefinite suspension. That's why I applied for the work restricted permit.
>
> Further, it is not clear what he actually received. He did—he does admit he received something saying he was indefinitely suspended.

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[7]The Secretary's certificate is reproduced in the State's App. at App. 5-6.

Tr. 64 (State's App. at App. 16-17). Although not entered in evidence at trial,[8] the notice sent to St. Hilaire is contained in the record and is reproduced in the State's Appendix at App. 3-4.

St. Hilaire was sentenced to seven days in the Oxford County jail and a fine of $500.

Throughout the proceedings in the trial court, St. Hilaire never expressly raised any challenge based on the U. S. Constitution. On appeal to the Maine Supreme Judicial Court, however, St. Hilaire argued that the granting of the State's motion in limine violated due process, that the exclusion of the evidence offered by St. Hilaire (along with the admission of the Secretary's certificate) violated St. Hilaire's right to confront and cross-examine witnesses in violation of the Sixth Amendment, that the use of the uncounseled April 16, 1986 conviction as a basis for the habitual offender finding violated substantive due process and the Sixth Amendment, and that the alleged failure of the State to prove actual notice of the habitual offender designation violated procedural due process.

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ARGUMENT

I. THE CONSTITUTIONAL CLAIMS ASSERTED BY APPELLANT WERE NOT PROPERLY PRESENTED BELOW.

We recognize that where the highest court of a state assumes that a federal question is properly before it and

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[8]See n. 1 at 6, supra.

proceeds to decide the issue, this Court will not consider the issue of whether the federal question was properly presented below. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 3.22 at 158 (6th ed. 1986). In this case, however, the only federal questions that were even arguably considered by the Maine Supreme Judicial Court were St. Hilaire's claim that the Secretary of State could not base an habitual offender designation on a prior uncounseled conviction and his claim that the State's failure to prove actual notice violated due process. The former argument was not reached, however, because the Maine Supreme Judicial Court ruled that, as a matter of state law, St. Hilaire could not collaterally attack his designation as an habitual offender after he had failed to seek an administrative hearing before the Secretary. *See* J.S. App. 4a & n.5. This would appear to constitute an adequate state law ground sufficient to foreclose appellate review on this issue. *E.g., Herb v. Pitcairn,* 324 U.S. 117, 125 (1945). Moreover, although the Maine Supreme Judicial Court did discuss the issue of actual notice, its ruling was directed to the issue of whether the statute required proof of actual notice, and its only mention of any due process issue involving notice was contained in a parenthetical explanation of a "*Cf.*" citation. *See* J.S. App. 5a.

In our view, this is not sufficient for this Court to find that the constitutional issues in question were properly presented below. Moreover, the other constitutional claims now raised by St. Hilaire—that the application of 29 M.R.S.A. § 2298 unconstitutionally foreclosed St. Hilaire's defenses that 29 M.R.S.A. § 58 violates the confrontation clause, and that 29 M.R.S.A. § 58 establishes a conclusive

presumption in violation of due process—were never addressed by the Maine Supreme Judicial Court.

Nor does it appear that any of St. Hilaire's claims were otherwise properly preserved below. Thus, the record indicates that no federal constitutional claims were expressly raised in the trial court. The only claim that can arguably be said to have been even *implicitly* raised in the trial court was the contention that the State could not rely upon a prior uncounseled conviction.[9] While the issue of notice was raised, the only questions addressed were whether notice was contested and whether the State had adequately proven notice, not whether actual notice was required as a matter of due process.[10]

Although it does appear that St. Hilaire included most of the issues on which he now seeks review in his brief to the Maine Supreme Judicial Court,[11] this was not sufficient to preserve these issues. Under Maine law, issues that are not raised in the trial court cannot be raised for the first time on appeal. This is true even if the issues in question concern alleged violations of the U.S. Constitution. *E.g., Harrington v. Inhabitants of the Town of Garland,* 381 A.2d 639, 642-43 (Me. 1978).

In sum, it does not appear that the issues advanced by St. Hilaire were properly preserved below and this

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[9]See Tr. 30 (State's App. at App. 13) (offer of proof—without further explanation—that St. Hilaire was not represented by counsel on April 16, 1986).

[10]See Tr. 42 (State's App. at App. 13-14.

[11]The exception is the conclusive presumption argument contained in the Jurisdictional Statement at 14. We are unable to discern any mention of this argument in St. Hilaire's brief.

Court therefore should dismiss St. Hilaire's appeal for lack of jurisdiction. *E.g., Cardinale v. Louisiana,* 394 U.S. 437, 438-39 (1969). *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice,* § 3.19 at 144 (6th ed. 1985).

In the alternative, as discussed below, we submit that regardless of whether St. Hilaire's claims were properly presented below, his appeal should be dismissed because none of his claims raises a substantial federal question.

II. APPELANT'S DUE PROCESS ATTACK ON THE APPLICATION OF 29 M.R.S.A. § 2298 MAY BE SUMMARILY REJECTED.

St. Hilaire's due process challenge to 29 M.R.S.A. § 2298 as applied, although argued in terms of the burden of proof and the presumption of innocence, reduces to the claim that it is constitutionally impermissible to foreclose St. Hilaire from asserting the invalidity of one of the three convictions on which his habitual offender designation was based. While St. Hilaire cites *Patterson v. New York,* 432 U.S. 197 (1977), to support his argument, that case actually supports the proposition that a state has the authority to determine for itself the elements of its crimes. In this case, as the decision of the Maine Supreme Judicial Court demonstrates, Maine has determined that the principal elements of a violation of 29 M.R.S.A. § 2298 are (1) the operation of a vehicle on a public way, and (2) the existence of a "then-effective" order revoking the operator's license pursuant to an habitual offender designation. *See* J.S. App. 3a, 5a, citing *State v. Vosmus,* 431 A.2d 621, 623 (Me. 1981).

We are aware of no authority suggesting that it violates due process for a state to require that a person who quarrels with his designation as an habitual offender raise his challenges to that designation (or any challenges to the convictions underlying that designation) *before* getting behind the wheel in violation of the Secretary of State's revocation order. As the Maine courts have made clear, the notion that a citizen may resort to "self-help" and ignore the revocation of his license, while retaining the right to challenge the revocation if he is caught, is contrary to the rule of law. *E.g., State v. O'Neill,* 473 A.2d 415, 417 (Me. 1984) ("a person may not take the law into his own hands by driving a motor vehicle in defiance of the State's determination that he is an habitual offender"); *State v. Higgins,* 338 A.2d 159 (Me. 1975). This principle is consistent with the decisions of this Court in such cases as *Walker v. City of Birmingham,* 388 U.S. 307, 320-21 (1967), and *United States v. United Mine Workers,* 330 U.S. 258 (1947). *See State v. Higgins,* 338 A.2d at 163-64.

Indeed, any argument that St. Hilaire could not constitutionally be prohibited from collaterally attacking the April 16, 1986 conviction is foreclosed by this Court's decision in *Lewis v. United States,* 445 U.S. 55 (1980), which upheld the prosecution of a felon for possessing a firearm notwithstanding the defendant's claim that one of the predicate felonies was constitutionally invalid because he had not been represented by counsel in violation of *Gideon v. Wainwright,* 372 U.S. 335 (1963), and its progeny. As this Court noted:

> It is important to note that a convicted felon may challenge the validity of a prior conviction or otherwise remove his disability before obtaining a firearm. We

> simply hold today that the firearms prosecution does not open the predicate conviction to a new form of collateral attack.

445 U.S. at 67.

III. APPELLANT DOES NOT HAVE STANDING TO COMPLAIN ABOUT THE FAILURE TO PROVE ACTUAL NOTICE; AND, IN ANY EVENT, HIS CLAIMS ARE WITHOUT MERIT.

The second aspect of St. Hilaire's due process attack on 29 M.R.S.A. § 2298 is based on the theory that it was not sufficient for the State to prove that notice of the habitual offender designation was sent to St. Hilaire; instead, St. Hilaire argues, the State had to prove that he had actually received the State's letter or otherwise had actual notice of the designation. As a preliminary matter, St. Hilaire does not have standing to raise this issue since, by his counsel's admission, he had received something in the mail in July of 1986 and understood at a minimum that he was indefinitely suspended from driving at that time. Tr. 64 (State's App. at App. 16-17); *see* Tr. 5 (State's App. at App. 9). Moreover, the record contains the notice that was in fact sent to St. Hilaire, which was contained in St. Hilaire's offer of proof, and that notice clearly informs St. Hilaire of his habitual offender designation and of his right to seek an administrative hearing. (State's App. at App. 3-4).

As a result, since St. Helaire himself had actual notice, he does not have standing to complain that 29 M.R.S.A. § 2298 as interpreted by the Maine Supreme Judicial Court does not require the State to prove that a defendant had

actual notice of the habitual offender designation. *See* J.S. App. 5a. As this Court has repeatedly held, a "plaintiff must assert his legal rights and interests and cannot rest his claim to relief upon the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). *Accord, Broadrick v. Oklahoma,* 413 U.S. 601, 610 (1973) ("constitutional rights are personal and may not be asserted vicariously"); *McGowan v. Maryland,* 366 U.S. 420, 429 (1961).

Moreover, even assuming that St. Hilaire has standing to complain that due process is violated unless the State is required to prove actual notice, his claim is without merit. The decisions of this Court do not require that a person whose liberty or property interests are affected by governmental action must receive actual notice of that fact. *See, e.g., Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 314 (1950). Instead, all that is required is "notice reasonably calculated, under all the circumstances, to apprise interested parties of [the governmental action in question]." *Id.* The State here proved that it mailed notice of the habitual offender designation to St. Hilaire's last known address. (State's App. at App. 3-4). Due process requires no more.

Indeed, it can readily be seen that a contrary holding would significantly burden the State's ability to enforce its habitual offender law, since the State would almost never be capable of offering independent proof of actual notice.

IV. APPELLANT'S CLAIM THAT 29 M.R.S.A. § 2298 INFRINGES UPON HIS SIXTH AMENDMENT RIGHT TO COUNSEL IS FORECLOSED BY THIS COURT'S DECISION IN LEWIS v. UNITED STATES.

St. Hilaire also argues that the Secretary's use of a prior, uncounseled misdemeanor conviction as the basis for a habitual offender designation violates his Sixth Amendment right to counsel. The short answer to this argument is that this Court's decision in *Lewis v. United States,* 445 U.S. 55 (1980), specifically permitted a prior uncounseled felony conviction to serve as the predicate for a subsequent conviction under a federal statute prohibiting possession of firearms by convicted felons. In *Lewis* the Court noted that it had never suggested that uncounseled convictions were invalid for all purposes, 445 U.S. at 66-67, and held that such convictions could properly serve as the basis of imposing a civil disability on the possession of firearms. This was true even though the civil disability was enforceable by criminal sanctions. *Id.* at 67.

The same situation is presented in this case. St. Hilaire's April 16, 1986 conviction was used in this case as part of the basis for a civil disability imposed by the Secretary of State—specifically, the revocation of St. Hilaire's driver's license based on his designation as an habitual offender. While a violation of this civil disability is independently punishable as a Class C crime, this is not constitutionally impermissible under *Lewis.*[12]

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[12]In contrast, *Baldasar v. Illinois,* 446 U.S. 222 (1980), involved a situation where a prior uncounseled conviction was not used as the basis for a civil disability but instead used to impose an enhanced penalty of incarceration.

In fact, this is an easier case than *Lewis* because, even though St. Hilaire was unrepresented on the April 16, 1986 conviction, that conviction resulted in only a $50 fine and was not therefore in any way constitutionally invalid. *Scott v. Illinois,* 440 U.S. 367 (1979). In contrast, *Lewis* involved a prior uncounseled felony conviction that was invalid under *Gideon v. Wainwright,* 372 U.S. 335 (1963). In addition, although St. Hilaire attempts to distinguish *Lewis* on the ground that the violation of the civil disability in that case was only punishable as a misdemeanor, this is incorrect. The *Lewis* opinion itself recites that the applicable statute imposed a punishment of up to two years' imprisonment. 445 U.S. at 56 n.1.

V. APPELLANT'S CONFRONTATION CLAUSE AND CONCLUSIVE PRESUMPTION CLAIMS ARE WITHOUT MERIT.

St. Hilaire's remaining arguments are addressed to the constitutionality of 29 M.R.S.A. § 58. He argues that the trial court's admission of the Secretary of State's certificate pursuant to that section, combined with its granting of the State's motion in limine, denied him the right to confront and cross-examine the witnesses against him and established a conclusive presumption against him in violation of due process. The problem with this argument is that the State's motion in limine did not seek to quash St. Hilaire's subpoena for the Deputy Secretary of State and Chief Hearing Examiner, nor did it seek to bar St. Hilaire from challenging the statements contained in the Secretary's certificate. The motion in limine was solely addressed to St. Hilaire's argument that he was entitled to attack the validity of the April 16, 1986 conviction. *See* State's App. at App. 1-2.

When the trial court granted the State's motion, therefore, St. Hilaire was still free to call officials from the Secretary of State's office to the stand and cross-examine them about the statements in the certificate. He was also free to offer other evidence to controvert the certificate. As 29 M.R.S.A. § 58 expressly states, the Secretary of State's certificate constitutes only "prima facie" evidence, and there is nothing in the record to suggest that St. Hilaire was precluded from challenging the statements contained therein.

The reason St. Hilaire did not challenge those statements is that there is, in fact, no dispute (1) that St. Hilaire's license was revoked for an indefinite period on July 21, 1986 as a result of his being designated an habitual offender, (2) that notice was sent to St. Hilaire's last known address no later than July 11, 1986, and (3) that St. Hilaire's license was still under revocation on January 1, 1987, when he was stopped for operating a vehicle at an excessive rate of speed. (State's App. at App. 3-4). There is also no dispute that at the time of the habitual offender designation St. Hilaire had three outstanding convictions within the past five years that met the statutory criteria for an habitual offender. Finally, it is undisputed that none of St. Hilaire's conditions had been vacated or otherwise challenged at the time he was caught operating a vehicle on January 1, 1987.

St. Hilaire's confrontation clause and conclusive presumption arguments thus reduce to the proposition that he should have been entitled to look behind his habitual offender designation and attack the validity of the April 16, 1986 conviction. Since, as previously discussed, Maine

does not violate the Constitution by foreclosing an habitual offender from collaterally attacking the convictions underlying his designation, St. Hilaire's confrontation clause and conclusive presumption arguments fall of their own weight.

CONCLUSION

This appeal should be dismissed because the federal questions raised by St. Hilaire were not properly presented below. In the alternative, St. Hilaire's appeal should be dismissed because his claims do not raise any substantial federal question and do not warrant plenary review.

Respectfully submitted,

JAMES E. TIERNEY
Attorney General
State of Maine

THOMAS D. WARREN
Deputy Attorney General
(Counsel of Record)

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(207) 289-3661

Attorneys for Appellee

Dated: Augusta, Maine
October 7, 1988

Appendix to State's Motion to Dismiss or Affirm

Table of Contents

Appendix A

State's Motion in Limine, filed November 17, 1987 ..... App. 1

Appendix B

Notice of Revocation and Opportunity for Hearing dated July 8, 1986 (part of Defendant's Exhibit 2, marked as offer of proof at trial) ..... App. 3

Appendix C

Secretary of State's Certificate admitted into evidence as State's Exhibit 1 ..... App. 5

Appendix D

Excerpts from Trial Transcript of November 17, 1987 ..... App. 7

APPENDIX A

NOV 17 1987

STATE OF MAINE OXFORD, SS.	SUPERIOR COURT CRIMINAL ACTION DOCKET NO. CR 87-51

STATE OF MAINE	)	MOTION IN
vs.	)	LIMINE
JEFFREY ST. HILAIRE	)	

Now comes the State of Maine and moves this court *in limine* to exclude testimony on the issue of whether or not the Secretary of State acted properly in declaring the defendant an Habitual Offender, for the following reasons:

1. The defendant cannot in the pending prosecution for driving after having been declared a Habitual Offender avoid conviction by leveling a collateral attack against the action of the Secretary of State as taken in a separate proceeding. *State v. Higgins,* 338 A.2d 159 (Me. 1975), *State v. Albert,* 418 A.2d 190 (Me. 1980); *Piacitelli v. Quinn,* 449 A.2d 1126 (Me. 1982); *State v. O'Neill,* 473 A.2d 415 (Me. 1984) and *Maines v. Secretary of State,* 493 A.2d 326 (Me. 1985).

2. This issue had been raised by the defendant in a prior Motion to Quash the Indictment, which was denied.

Wherefore, the State respectfully requests the testimony be excluded, and that the issues be limited to (1)

was the defendant operating a motor vehicle and (2) was the defendant a Habitual Offender.

Dated: November 17, 1987

/s/ Patricia A. Mador
Patricia A. Mador
Assistant District Attorney

ORDER

The above motion is hereby (granted) (*denied*).

Dated: November 17, 1987

/s/ Paul A. Fritzsche
Justice, Superior Court

APPENDIX B

Driver License Control
George E. Storer 289-2386

STATE OF MAINE
Department of State
Motor Vehicle Division
Augusta, Maine 04333

Linwood F. Ross
Deputy Secretary of State

Printed 07/08/86

NOTICE OF REVOCATION AND
OPPORTUNITY FOR HEARING

Mailed No Later Than 07/11/86
License Number: 7613132 Exp:89
Date of Birth: 02/07/64

Jeffrey St. Hilaire
RFD 1 Box 24
Auburn, ME 04210 S534

This is to notify you that your driving record, cited at least in part below has brought you within the statutory definition of an habitual offender. Found in 29 M.R.S.A., ch. 18-A. As a result of this, the Secretary of State is hereby notifying you that your motor vehicle operator's license and/or right to operate in the State of Maine, is revoked for an indefinite period effective 07/21/86. Please forward your driver's license, if you have one, to the Secretary of State by 07/21/86 using the enclosed envelope.

You have the opportunity to request a hearing within 30 days of your receipt of this notice. That hearing, if requested, will be held pursuant to 5 M.R.S.A., Sec. 9051 to 9064 and Chapter 2, rules for hearings of the Secretary of State, and will be limited to only two issues:

1. Whether you are the same person who has been convicted of the offenses cited, and
2. Whether your driving record does bring you within the definition of an habitual offender.

No other information is relevant to whether or not you are, in fact, an habitual offender.

Your license, and/or right to operate may be restored only by petitioning the Secretary of State, and you may not petition the Secretary of State until your license and/or right to operate has been revoked for a one year period. At that time, if your petition is successful, you must file proof of financial responsibility and pay a $25.00 reinstatement fee before your license is restored.

Note: If you are convicted of operating a motor vehicle while this revocation is in effect, then you are subject to penalties of up to $5,000.00 and/or 5 years imprisonment and an additional revocation period of up to 3 years.

Your Driving Record

Date	Offense
11/13/81	Operating Without License
02/29/84	Blood Alcohol Content .10 Plus
04/16/86	Operating After Suspension

Reply or questions
Should be addressed to: Driver Licensing and Control
Telephone: 207-289-3636

/s/ George E. Storer
George E. Storer
Deputy Secretary of State

APPENDIX C

STATE'S EXHIBIT #1

STATE OF MAINE

Department of State

I, the Secretary of State, of the State of Maine, certify that the office of the Secretary of State is the legal repository of the Great Seal of the State of Maine and also custodian of the records relating to the revocation, restoration and suspension of operators' licenses and registrations, and that the paper to which this is attached is a true copy from the records of this office.

I further certify that, according to our records the license or right to operate of Jeffrey St. Hilaire, whose date of birth is February 7, 1964, was revoked on July 21, 1986, for an indefinite period, as a result of Mr. St. Hilaire's being defined as Habitual Offender on that date in accordance with 29 MRSA, Section 2292.

That revocation is to remain in effect until after petitioning the Secretary of State, after filing proof of liability insurance coverage, and after completion of the mandatory revocation period.

Notice of revocation was mailed by regular mail, no later than July 11, 1986, to the last known address given by the licensee, which was RFD 1 Box 24, Auburn, Maine.

Mr. St. Hilaire's right to operate was under revocation on January 1, 1987.

I further certify that the attached copy is a true copy of his driving record as maintained by the Secretary of State, as of this date.

In Testimony Whereof, I have caused the Great Seal of the State to be hereunto affixed. GIVEN under my hand at Augusta, this twenty-eighth day of January in the year of our Lord one thousand nine hundred and eighty-seven.

/s/ Rodney S. Quinn
Secretary of State

(SEAL)

Form MVCR-104 Rev. 12/83

APPENDIX D

STATE OF MAINE
OXFORD, ss.

SUPERIOR COURT
CRIMINAL ACTION
Docket No. CR-87-51
Law Docket No. OXF-87-506

STATE OF MAINE,
Plaintiff,

vs.

JEFFREY ST. HILAIRE,
Defendant.

TRIAL PROCEEDINGS

(with jury)

BEFORE:

HONORABLE PAUL A. FRITZSCHE,
JUSTICE OF THE SUPERIOR COURT

Oxford County Courthouse
South Paris, Maine

November 17, 1987
1:21 p.m.

APPEARANCES:

For the Plaintiff: PATRICIA A. MADOR, Esq.

For the Defendant: NERIA R. DOUGLASS, Esq.

Penny L. Philbrick
Official Court Reporter

• • •

[portion deleted]

[3] The Court: So if I understand correctly, there is no question Mr. St. Hilaire was operating? There's no

question he was operating on a public way on the first of the year in Fryeburg?

The question becomes: Was he an habitual offender at that time? And you would say that even though he was on—at least on paper an habitual offender at that time and may or may not have known that but certainly was on paper an habitual offender, he—that was an improper designation because some five or so months later the District Court vacated [4] one of the three convictions which were necessary to obtain the habitual offender status, that being the final one, operating after suspension; so, therefore, even if Mr. St. Hilaire did not know that he was not an habitual offender—in other words, even if he thought he was an habitual offender—then he gets the benefit of finding out later that that was an incorrect designation?

Ms. Douglass: My position is that at the time, there'll be no issue about his operation, about his being on the public way. The issue in this case is going to be whether he was ever guilty of the operating after suspension that put him into this habitual offender category.

It is not as a matter of the vacating of that judgment that we raise this issue but as a matter of the facts that put him into the classification as being an habitual offender and our argument is that those facts existed on March 25, 1986 and are at issue in this case because those facts determine whether or not he is an habitual offender and when he was operating on the 1st of January in 1987, he was innocent because the designation of habitual offender, of which we were going to contest notice to some extent at any rate, was not correct.

[5] That designation as habitual offender is the essence of our—the jury's determination in our trial.

The Court: So you would say that—did Mr. St. Hilaire or did Mr. St. Hilaire not know on January 1 that the Secretary of State thought him to be an habitual offender?

Ms. Douglass: No. My position is the issue is whether he was, in fact, a habitual offender on January 1, 1987.

It's our position that he was not, regardless of what the State told him.

The Court: Are you willing, however, to answer my question as to what his views were on January 1?

Ms. Douglass: His—

The Court: You obviously don't have to because he doesn't have to make any admissions to me or anybody else.

Ms. Douglass: No. I think I'm going to offer that the evidence will show he understood he was under an indefinite suspenson but did not understand that he was an habitual offender.

* * *

[portion deleted]

[23] The Court: I believe that it may not be necessary; but in an abundance of caution, Miss Douglas would like to make an offer of proof on the record; and you have the floor. Say what you would like so that the Maine Supreme Court, in the [24] event of an appeal, knows precisely what your concerns are.

Ms. Douglass: Well, Judge, actually, I had anticipated that I would like to, perhaps at the close of the case, even while the jury's deliberating, put on the record the testimony of several witnesses that I have, including my own client and two employees of the State of Maine, Department of Motor Vehicles as—and there are also questions on cross-examination that I'm going to want to ask of Trooper Byron.

The Court: I don't think it's necessary to—when a person makes an offer of proof to do it in the detail you would had the matter been presented to the jury.

The purpose of an offer of proof is so that the appellate court can know what the issues are and what evidence has been excluded; and what's often done, though not always though, it's oftentimes sufficient is for the attorney to simply summarize what he or she expects would have been introduced or offered had the Judge ruled differently so—

Ms. Douglass: Then I'll summarize it, Judge.

The Court: I think that would be quicker, [25] and you will be fully protected.

Ms. Douglass: First, as to Trooper Byron, I would be asking him whether or not he understood that the Department of Motor Vehicles ever made any mistakes or had made any mistakes in computing Jeff St. Hilaire's record.

I would ask him whether or not he was aware that the designation of habitual offender was applied to Jeff St. Hilaire as a result of the State's delay in crediting Jeff St. Hilaire's reinstatement.

Also, I would submit to him the records of the Department of Motor Vehicles for his examination showing that Jeff St. Hilaire paid his reinstatement fee on March 20, 1986 and that their records state that he was under suspension at 6:05 a.m. on March 25, 1986 but he was not under suspension at 7:48 March 20, 198—excuse me, 25, 1986.

I would like to ask him his opinion as to whether he thinks that is fair conduct on the part of the Department of Motor Vehicles.

I would like to ask him his opinion of whether Jeffrey St. Hilaire's license should be restored as of 7:48 as opposed to 6:05 a.m. on the particular date on which he was stopped.

* * *

[colloquy deleted]

[27] The Court: Why don't you take a few more minutes if you like. I'm fully convinced this is entirely unnecessary. If you feel better, go head.

Ms. Douglass: Okay. Thank you.

The questions I generally—and I'll try and [28] give the general questions that I have for Mr. Storer, who is in charge of license control, would be on the policies of the State as to receipt of payment for reinstatement; and I may yet call him but I'm—just as they relate to the earlier issue, I would ask him why it took six days to credit his payment?

What are the employees of the Department of Motor Vehicles told to tell individuals as to the length of time it

takes to credit those because, in fact, Jeff St. Hilaire was told that it would take two days to credit that payment; and, in fact, it took three.

I'd ask him to explain what this business about the difference between 6:05 a.m. and 6:48 a.m. is as to March 25, 1986.

I'd ask him as to what he had as to written policies as to what employees tell members of the public who've paid reinstatement fees.

I'd ask him whether the correct record is as it exists on July 7, 1986, one of which I intend to offer, which shows that he is not an habitual offender.

Through Robert O'Connell, I would also question why it was that he refused appeal of this [29] issue on the basis of newly found evidence, which, as I say, is akin to Rule 60(b) but the—those administrative law judges will not consider and similar questions to those that I would ask of Mr. Storer.

I would ask them why that record of payment was never shown to Jeff St. Hilaire. I can't say. Wasn't discovered until I asked for all the computer printouts from the State March of 1987.

I'd ask them if they'd ever given that information to anyone else to see that it is, in fact, newly discovered evidence on our behalf and whether his license is correct now.

Further, I would offer evidence through Jeffrey St. Hilaire that he was told that his license should be credited with the reinstatement payment two days after it was received in Lewiston where he paid it and that he was surprised when he discovered that it wasn't, in fact, credited

for another six days or five days depending on how you count it.

I'd ask him and the same of O'Connell as to his attempts to pursue appeal of that administrative decision that was an habitual offender and what the status of that is now and, in fact, showed that it [30] is in litigation in the Androscoggin Superior Court and that the argument there is that newly discovered evidence warrants reopening that.

I'd offer proof that he wasn't represented by a lawyer when he went before Judge Beliveau on April 16, 1987—excuse me, '86 cocerning the March 25 charge from the Auburn Police Department and that he under—he understood he felt or thought he had pleaded innocent and that, in fact, learned that he was put down for guilty, when he paid, was told to pay $50 fine but through embarrassment, did not go back and get the judge's designation.

I guess that's a sum—a brief summary.

The Court: Thank you. There's nothing further, we'll bring the jury in and have them sworn and have opening statements.

* * *

[portion deleted]

[42] The Court: Why don't we all be seated.

Miss Douglass, why don't you go ahead. You had a motion to make.

Ms. Douglass: Yes, I do, Your Honor. I move for a directed verdict on the issue that the State has failed to prove that its records are correct.

It has failed to prove that notice was received by the Defendant; and on those issues, the State has failed to prove its case beyond a reasonable doubt.

The Court: Miss Mador.

Ms. Mador: Your Honor, at this juncture, the Court must view the evidence in the light most favorable to the State.

The evidence is that the Trooper observed the Defendant operating a motor vehicle on a public way while the habitual offender status was in effect.

The State has offered and has been admitted State's Exhibit No. 1 which is the self-authenticating document from the Secretary of State's office.

That document indicates that the notice of revocation was mailed by regular mail no later than July the 11, 1986 to the last known address of the [43] licensee which is RFD 1, Box 24, Auburn, Maine.

The only obligation is to mail notifications to the last address given by the licensee.

The State submits that based on the testimony of the officer coupled with the self-authenticating document and the Court's obligation to view the evidence in the light most favorable to the prosecution at this juncture, that it has met its burden; and the motion should be denied.

The Court: The motion is denied. Will the Defendant be calling any witnesses?

Ms. Douglass: No.

* * *

[portion deleted]

[62] The Court: Does the State have a sentencing recommendation?

Ms. Mador: Your Honor, the State would ask the Court to review the Defendant's motor vehicle record. That motor vehicle record is extensive.

The State would point out that the operating under the influence conviction in 1984 is a civil conviction; and upon my checking with the District Court in Lewiston, I've determined that the Defendant was not represented by counsel at that time.

The State would leave sentencing to the Court's discretion.

The Court: Ms. Douglass.

Ms. Douglass: Your Honor, the—it's difficult to say he's innocent of this charge. That's what we're going to be appealing; but I think the sentence has to take into consideration the fact that Jeffrey St. Hilaire has done everything in his power, after discovering the evidence of paper reinstatement fee which caused him to go into [63] the last category as habitual offender, to correct his motor vehicle license as, in fact, it has been corrected today.

The Court: Could you tell me what he did to correct it between March of '86 and January 1 of '87.

Ms. Douglass: In March of '86, he told the officer when he was stopped that he had paid his reinstatement fee. He thought he had. I'm just pointing out the facts from his perspective.

When he went before the judge, he was under the impression that he had pleaded innocent and was surprised when he learned that he had—was going to be paying the fee and that, I think, is something he misunderstood at least at the time of the arraignment because I think if you look at the record on that, that was an arraignment time, not a time for trial. That was April of 1986.

In October of 1986, he applied for a work restricted permit which was never, that I can see, even considered by the State. I don't think he received any notice whatsoever as to what—what they did with that application. They certainly took his money. In fact, I think you'll see in the record that he paid two reinstatement fees.

[64] In February of 1987—and I guess I'll go into the circumstances under which he was driving in January which is that his fiance didn't know how to get to the destination they were going to and so he was driving.

He hired me to clear up his matters in February of '87; and since then, I've been doing everything I could, including requesting records of all the computer entries.

He told me at that time, I never understood what happened because I paid my reinstatement fee; and they still said I was guilty. I thought I went and told the judge I wasn't guilty, and he said I was guilty.

Now, Jeffrey has some limited understanding of what he received in the mail in July of 1986. He understood he was placed on indefinite suspension; but as he told me, I never saw anything in there that said I was habitual offender. I thought I was under indefinite suspension. That's why I applied for the work restricted permit.

Further, it's not clear what he actually received. He did—he does admit he received something saying that he was indefinitely suspended.

The attempt to clarify his record began in [65] March of 198—February, I guess, but also in March of '87 when I pursued the circumstances of his suspension and in particular, the suspension in April of—that was conviction of April of 1986 as to his payment and if you look at the records that I submitted, it shows that he was supposedly declared an—under suspension at 6:05 a.m. when he was stopped but not at 7:48 a.m.

It shows on the records of the Department of Motor Vehicles that he paid his reinstatement fee and he paid this in person in Lewiston and he asked the personnel there how long it would take to process that.

She said, Two days; wait three to be safe. Well, he waited five days to drive. So at any rate, when he was stopped, he was told that he was under suspension and he thought that was just a computer error and it would be cleared up.

Then when he went to court, he didn't understand that he was put down for guilty.

• • •

[portion deleted]